IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 04 OF 2005

STATE
Through Public Prosecutor,
Panaji, Goa. ..... Appellant

V e r s u s

Rajendra Datta Zarekar,
R/o. H. No.6, Asode,
Sattari, Goa. ..... Respondent

Mrs. Winnie Coutinho, Public Prosecutor for the State.

Shri S. N. Joshi, Advocate for the Respondent/Accused.

Coram:- N. A. BRITTO, J.

Date:- 16th August, 2006

ORAL JUDGMENT

This is State's appeal against the acquittal of the accused under Section 342 and 376 of I.P.C.

2. The case of the prosecution could be summarized as follows:

3. The victim/P.w.8, is the second daughter of Pushpa and Satyam Ahire, namely P.w.1 and P.w.2, respectively. Pushpa/P.w.1 has an aunt namely Manda/P.w.4, who has three houses in the locality, two of which she has allowed her sisters to occupy and one of the rooms of her house, she has let out to be occupied by some boys working in Nestle factory. The accused was one of the six boys occupying the said room let out by Manda/P.w.4. The incident took place on 14.03.2003, and on that day, the accused left the Nestle factory at about 4.30 p.m. The house of Pushpa/P.w.1 and Satyam/P.w.2 is close to the said house of Manda/P.w.4. Pushpa/P.w.1 served tea for her children at about 3.45 p.m. and then went to prepare some sweetdish/Satwa for her children and as she was preparing the same, she heard the sound of her younger daughter, namely the victim/P.w.8, from the house of the said Manda/P.w.4, who is married to Mohandas, and therefore, Pushpa/P.w.1 went to the said room and found it closed. Pushpa/P.w.1 knocked at the door and she heard the victim/P.w.8 was crying inside the said room and when the door of the said room was opened, the victim/P.w.8, came running towards her and she asked the accused as to what he was doing inside the room but the accused kept quiet and when she asked her daughter, the victim/P.w.8, her daughter informed her that she was called inside the room by the accused and thereafter closed

the door and forced her to lie down on the mat and then removed her knicker and then his own pant and thereafter inserted his private part into the private part of her daughter and she also told her that the accused had threatened her not to disclose the said fact to her mother. As per Pushpa/Pw.1, Sandesh, of about 17 years of age, the son of Manda/P.w.4, was with her at that time. Then she brought the victim/P.w.8 to her residence and called her sisters and other family members. The husband of Pushpa/P.w.1, namely Satyam/P.w.2, returned from Tisk, Usgao, at about 05.05 p.m. and he found that his daughter was totally down and exhausted, etc. and his wife was not at home and after his wife returned, after about ten minutes, his wife told him that she had gone to see the accused and when he told his wife that he would lodge a complaint, his wife advised him not to lodge the complaint until their aunty Manda/P.w.4 returned and after the said Manda @ Amrutem/Pw.4 returned, she was told about the incident whereupon Manda/P.w.4 is stated to have examined the victim/P.w.8 but did not see any blood inside her private part. Thereafter they proceeded to Ponda Police Station, where they met PSI Vaigankar/P.w.11, who was informed about the rape committed by the accused and he in turn referred the victim/P.w.8 for medical examination where the victim/P.w.8 was examined by Dr. Rodrigues/P.w.10, Associate

Professor in Forensic Medicine of Goa Medical College, Bambolim, who found that the victim/P.w.8 had a bruise of 2 x 1.5 cms on right labia majora and minora, tender to touch. He also found that there was laceration of 5 x 2 mms on right labia minora near the clitoris, tender to touch and although he found that the hymen was intact, he found that the hymenal border was bruised, edematous and tender to touch and upon the said physical examination of the victim/P.w.8, Dr. Rodrigues/P.w.10 concluded that there was evidence on recent penetration. After receiving the said information, PSI Vaingankar/P.w.11, recorded a detailed complaint of Pushpa/P.w.1 and the statement of the victim/P.w.8 and, thereafter, proceeded to arrest the accused to the said Nestle factory and then after obtaining the address of the accused, proceeded to Sattari, at the residence of the accused and brought him to the Police Station and arrested the accused and seized the clothes produced by the accused at the Police Station in the presence of Tarun Kumar/P.w.5. The accused was sent for medical examination and was examined by the same Dr. Rodrigues/P.w.10. Dr. Rodrigues found the accused to be of 21 years of age and was of average built. As per Dr. Rodrigues/P.w.10, all the clothes of the accused were changed and therefore, they were not preserved. Dr. Rodrigues/P.w.10 found that there were no abrasions or bruises on the

genitals of the accused but opined that on physical and genital examination, there was nothing to suggest that the accused was incapable of sexual intercourse. The scene of offence panchanama was conducted on 15.10.2003, in the presence of Narayan/P.w.6, during which a mat and a bedsheet were seized. Later the clothes of the victim/P.w.8, produced by Pushpa/P.w.1 were attached in the presence of the said Tarun Kumar/P.w.5. The blood grouping was done through Sanjay/P.w.9, who certified that the victim/P.w.8 was having blood group O Rh positive, while the accused was having the blood group A Rh positive. The seized articles of the accused namely the pant, the shirt and the underwear (exhibit 1/A to C), those seized from the scene namely nylon mat and bedsheet, (exhibit 2A and 2B), and those of the victim/P.w.8, namely a frock and a knicker, (exhibit 3A and 3B), were sent to the Central Forensic Science Laboratory, which opined that neither semen nor blood could be detected on the said exhibits. As on the date of the incident, the victim/P.w.8, was 5 years, one month and three days old, while the accused, as already stated, was 21 years of age.

4. The accused having been charged under Section 342 and 376 I.P.C., prosecution examined in all eleven witnesses. The accused did not

examine any. The case of the accused, as suggested to Pushpa/P.w.1, was that she was friendly with the accused for the last about four years and that as the earnings of her husband were not sufficient, she used to borrow money from the accused as well as his brother. The accused also suggested to her that the accused was having extra marital relation with her, a suggestion which she denied. It was also suggested to her that on the date of the incident, she had called the accused to her house, forced the accused to touch her body and after the accused discharged the semen, the same was cleaned with the frock of the victim/P.w.8 and this she did in an attempt to rope in the accused as she wanted to continue to have relations with the accused. The said bold suggestions were subsequently not adhered to by the accused, when the accused was examined under Section 313 of the Code (Code of Criminal Procedure, 1973). All that the accused stated in his said statement is that he used to go to the said room only when he was working on the second and third shifts but if he was on first shift, he would go home. The accused stated that whenever he went to the room, Pushpa/P.w.1 used to call him to her house and demand money from him on the day of salary and after some days, she started demanding gold chain, and on account of such demands, he stopped going to her room. The accused stated that he had not gone to the room for about eight days and,

therefore, when she met him, she asked him why he was not coming to the room and as he did not come to the room as per her request, she filed a false complaint against him. The accused also stated that on 14.10.2003, the police came to his house at about 12.10 in the night and woke him up and inquired with him as to what had happened and brought him to the Police Station in the police jeep and Pushpa/P.w.1 and her daughter/P.w.8, had come on the next day to the Police Station and when Pushpa/P.w.1 was asked whether he had raped her daughter, she had answered in the negative and, on the same day, his brother approached Pushpa/P.w.1 at her residence and asked her as to why she filed a complaint against him and, at that time, Pushpa/P.w.1, demanded Rs.5,00,000/- and on payment of the same, promised to withdraw the complaint. The accused also stated that on the date of her deposition before the Court, Pushpa/P.w.1 again approached outside the Court premises and as a final warning, demanded Rs.50,000/- from him with a promise to retract from her earlier statement. The accused also stated that on the said date, the statement of the victim/P.w.8 was recorded, the victim was brought duly tutored.

5. In the trial, the prosecution had examined as many as eleven witnesses including the Investigating Officer. The learned Trial Court

proceeded to appreciate the evidence of the victim/P.w.8 as if she was an ordinary child witness not realizing that she was also the victim and therefore, an injured witness. The learned trial Court did not apply the standard which was required to be applied whilst appreciating the evidence of injured witnesses. There is no doubt that child witnesses many a times are prone to tutoring but it is an accepted norm even in the case of such witnesses that if after careful scrutiny of their evidence, the Court comes to the conclusion that there is impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness. The learned trial Court lost sight of the fact that the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury, is the best witness in the sense that he is least likely to exculpate the real culprit, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. While appreciating the evidence of a injured witness, it has to be kept in mind that his or her presence at the time and place of occurrence cannot be doubted. He or she does not have any reason to omit the real culprit/s and implicate falsely the accused persons. The evidence of an injured witness is of great value to the prosecution and it cannot be doubted merely on some supposed natural conduct of a person during the incident or after the

incident because it is difficult to imagine how a witness would act or react to a particular incident. Even in the case of other witnesses, if there is an exaggeration in their evidence, then the exaggeration is to be discarded and not their entire evidence. Courts are not required to attach undue importance to minor discrepancies, but must consider broad spectrum of the case of the prosecution. Discrepancies many a times are found in the evidence of witnesses due to normal errors or perceptions or observations or due to lapse of memory. Even truthful witnesses at times with a view to back up a good case add an exaggerated version and, in situation like this, it is the duty of the Court to discard the exaggerated version and not the entire version. In case there is a doubt in respect of certain facts stated by a witness, the proper course is to ignore that fact only unless it can be shown that the said fact is so vital that it goes to the very root of the case so as to demolish the entire case of the prosecution. In the case at hand, it appears that minor discrepancies in the evidence of the prosecution witnesses have been blown up out of proportion by the learned trial Court in an attempt to disbelieve the versions given by them.

6. The law as far as the appreciation of the evidence of a victim of rape is well settled. In the case of ***Santan Fernandes v. State (2001(2)***

G.L.T. 237), on which reliance has been placed on behalf of both the parties, this Court had referred to the case of ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat (AIR 1983 SC 753)***, wherein the Supreme Court had stated that corroboration is not the sine qua non for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so, is to justify the charge of male chauvinism in a male dominated society. The Apex Court had further observed that a girl or a woman in the tradition bound non-permissive society of India, would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. Again the Supreme Court in the case of ***Punjab v. Gurmit Singh (1996 (2) S.C.C. 384),*** held that it is now well accepted principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. It is also well accepted principle of law that corroboration as a condition or judicial reliance on the testimony of the prosecutrix, is not a requirement of law but a guidance of prudence. The woman or a girl subjected to sexual assault is

not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion treating her as if she was an accomplice. In the case of ***State of Rajasthan v. N. K. ((2000) 5 S.C.C. 30)***, the Supreme Court again held that the testimony of the prosecutrix should be appreciated on the basis of probabilities like the testimony of any other witness and conviction can be based solely on such testimony but if the Court finds it difficult to accept her testimony, it must seek assurance to her testimony which may be short of corroboration of their evidence. The same view has been reiterated by the Apex Court in the case of ***State of Tamil Nadu v. Ravi @ Nehru (2006 AIR SCW 3444)***, wherein the Supreme Court has reiterated the view expressed in ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*** (supra).

7. After having considered the law to be kept in mind, it is now necessary to advert to the evidence of the prosecution witnesses, particularly the victim/P.w.8, her parents Pushpa/P.w.1 and Satyam/P.w.2, her aunt Manda/P.w.4 and last but not the least, Dr. Rodrigues/P.w.10. The evidence of other witnesses is of not much relevance to the case of the prosecution in the light of the findings given by the C.F.S.L., Hyderabad.

8. The victim/P.w.8 in her evidence before the Court stated that the accused resided in a room close to her house and was employed and that the accused returned in the evening to the said room. She stated that when she was looking at the book, the accused came out from the said room/house of her aunt/P.w.4 and then pulled her in his room. She stated that accused had opened the latch of the door and had taken her inside and at that time, she was wearing a frock and a knicker and after taking her inside, the accused closed the door and latched it from inside and then removed his pant and her knicker and thereafter the accused "tyache nini majha hetun ghatli", after the accused made her to sit on his lap and at that time she had pain and cried "*mummy mummy*", when her mother/P.w.1 and Sandesh (her cousin), came to the door and knocked at the door and the accused opened the door and she narrated the incident to her mother. In cross examination, the victim/P.w.8 stated that she did not remember how many months back the incident had taken place but stated that her father on that day had gone to Ponda to bring some articles and her mother was preparing Satwa/sweet dish. She also stated that Manda/P.w.4, was inside the house. She also stated that whenever she used to go to the house of Manda/P.w.4, the accused used to play with her but the accused had never given her any chocolate nor had taken her on his lap. In further cross

examination, the victim/P.w.8 stated that she was not playing outside but was in the house of her aunt/P.w.4 and was watching T.V. She again stated that on that day, the accused called her, played with her and left her and yet again she stated that there was a mat and a bedsheet in the room where she was made to sleep on the mat and the bedsheet and the accused had slept over her. On behalf of the accused, reliance has been placed on the case of ***Ratansinh Dalsukhbhai Nayak v. State of Gujarat (2004 (1) S.C.C. 64),*** and it is submitted that the evidence of the victim/P.w.8 from the very tenor of it, appears to have been that of a tutored witness. It has also been submitted that the learned trial Court had the benefit of observing the victim/P.w.8 giving the said evidence and since the learned trial Court has also come to the conclusion that the victim/P.w.8 has been tutored, the said finding need not be interfered in by this Court.

9. In the case of ***Ratansinh Dalsukhbhai Nayak v. State of Gujarat*** (supra), the Supreme Court observed that the decision on the question whether a child witness has sufficient intelligence primarily rests with the trial Judge, who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his

understanding of the obligation of an oath. The decision of the trial Court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear that its conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness. It may be observed at this stage, that the case of ***Ratansinh Dalsukhbhai Nayak v. State of Gujarat*** (supra), was a case of child witness simpliciter and not a child witness who was also the victim of offence like the case at hand. The learned trial Court did take note of certain discrepancies appearing in the evidence of the victim/P.w.8. The learned Trial Court noted that the victim/P.w.8 in her examination in chief had deposed that prior to the incident, she was looking at the book at the house of her aunt and in the cross examination she stated that she was watching T.V. inside the house of her aunt and yet in her further cross examination she stated that she was playing with her sister Supriya and brother Sanket. The learned trial Court noted that the

victim/P.w.8 had made three different statements about what activity she was doing before the alleged incident. Likewise, the learned trial Court had also noted that the victim/P.w.8 at one stage, had stated that the accused had pulled her in the room and in cross examination had stated that the accused had called her into the room. The learned trial Court had then concluded, and in my view rightly, the said discrepancies were minor in nature in the evidence of the prosecutrix and that it was possible that she was carrying the said activities of looking at the book, watching the T.V. and playing with her brother and sister before the incident. At the same time, the learned trial Court observed that the said evidence would show that the victim was not able to express herself and that the capacity of the victim to understand and give rational answers was not satisfactory in the light of the said discrepancies. I am unable to endorse this conclusion based on available material on record. The evidence of the victim/P.w.8 shows that she volunteered to give the statement after she was made comfortable in the presence of her mother/P.w.1 and in the absence of the accused. In my view, the learned trial Judge did not make any allowance to the victim/P.w.8, considering that she was of a tender age and was coming from a rural background and, as such, her understanding of the entire situation was limited to some extent. Her evidence could not have been

appreciated as that of a grown up girl of mature understanding. The learned trial Court read the statement "*the accused called her, played with her and left her out*" out of context of the evidence given by her. In fact, her entire evidence had to be read as a whole, which the learned trial Court failed to do, and when so read, it indicated that she had sufficiently described the act committed by the accused. No doubt that the victim/P.w.8 had stated in her examination in chief "tyache nini majha hetun ghatli", which the learned trial Court found to be a tutored statement. In my view, there was nothing fundamentally different in the said statement of the victim/P.w.8 when otherwise her mother/P.w.1 had stated that the victim/P.w.8 had told her that the accused had inserted his private part in the private part of her daughter. That is the same statement, which her mother/P.w.1 gave whilst narrating the incident in FIR as well as before the Court and, therefore, it could not be said that the said statement recorded in actual words used in Konkanni, was in any way materially different from the version given by the victim/P.w.8 to her mother/P.w.1. It was nobody's case that the said room which was occupied by the accused along with other boys had any bed or chairs and all that it had was mats and bedsheets. Whether the act was performed by the accused by taking her on his lap or after making her sleep on the mat and the bedsheet and then the accused

sleeping over her, would not carry any weighty significance since the said discrepancies came from child who was five years old. The said discrepancies do not create a different story nor do they change the complexion of the case. In my view, the evidence of the victim/P.w.8 could not have been rejected either because the victim lacked understanding or because she was tutored. Being an injured witness herself, she would not have falsely implicated the accused. Her evidence, when read as a whole, had an impress or ring of truth. The discrepancies did not touch the core of her version. Her evidence could not have been rejected. Moreover, her evidence was substantially corroborated by the evidence of other witnesses, and that takes us to Dr. Rodrigues/P.w.10.

10. Dr. Rodrigues/P.w.10, is the Associate Professor in the Department of Forensic Medicine in Goa Medical College, Bambolim. He has stated that on 14.10.2003, between 11.45 p.m. to 01.00 a.m., he examined the victim/P.w.8 and found the injuries which have been referred to herein above. He found that the hymen of the victim/P.w.8 was intact. As far as the accused is concerned, he found that there were no injuries on him but at the same time, he found that the accused was a verile person and there was nothing to suggest that he was incapable of sexual intercourse.

The learned trial Court unfortunately has discarded the evidence of Dr. Rodrigues/P.w.10 by relying on the evidence of the aunt/P.w.4 and the father/P.w.2. In fact, Satyam/P.w.2 stated that after he was informed about the rape, he had examined her daughter and her knicker was wet. Presumably, Satyam/P.w.2, did not examine the private part of her daughter in detail. Manda/P.w.4, did it. According to Manda/P.w.4, she had removed the underwear of the victim and had examined her private part. She also stated that she had only opened the said private part but she could not see anything abnormal. She has categorically stated that she had not inserted the finger inside the private part of victim/P.w.8. The learned Trial Judge has used the evidence of Manda/P.w.4, the evidence of an illiterate, untrained, inexperienced witness, to discredit the evidence of a trained experienced Medical Doctor. It is quite probable that Manda/P.w.4 being an ordinary illiterate woman, was not immediately able to see with naked eyes the injuries on the private part of the victim/P.w.8, which could only be seen by the eagle eyes of a trained medical person. The learned trial Court has referred to the evidence of prosecution witnesses and has observed that after the incident, the victim/P.w.8 was playing, and therefore, it was possible that the said injuries were caused to her at the time she was playing. This conclusion of the learned trial Court is grossly

erroneous. No injuries as observed by Dr. Rodrigues/P.w.10, can be caused by ordinary play of children. In fact, there was no reason good enough to reject the evidence of an independent witness like Dr. Rodrigues/P.w.10. It has been submitted on behalf of the accused that the case history given by the police has contributed to the opinion given by Dr. Rodrigues/P.w.10. I am not inclined to accept the said submission. In my view, Dr. Rodrigues/P.w.10, as an independent witness, must have certainly examined the victim/P.w.8 independently and has found the said injuries. It is also submitted on behalf of the accused, by his learned Counsel, that Dr. Rodrigues/P.w.10 should not be believed because in between, the prosecution witness had interfered with the private part of the victim/P.w.8. This submission also cannot be accepted in the light of the statements of Satyam/P.w.2 and Manda/P.w.4. There is nothing in the evidence of Satyam/P.w.2 even to remotely suggest that he had put his finger into the private part of the victim/P.w.8. Manda/P.w.4 is more categorical in stating that she had not inserted her finger into the private part of the victim/P.w.8. It is further submitted by learned Counsel on behalf of the accused that there were no injuries on the person of the accused and this shows that the story of the victim/P.w.8 may not be true, and in fact, it raises a doubt because no semen has been found either on the private part

of the victim/P.w.8 or the accused or for that matter the clothes they were wearing or the mat and the bedsheet which they had allegedly used. It is also submitted by learned Counsel on behalf of the accused that in case the accused really tried to penetrate the victim/P.w.8, then the hymen would not have remained intact. Though, these submissions appear to be attractive at first flush, they are required to be rejected. As far as rupture of the hymen is concerned, it is quite probable that the moment the accused tried to penetrate the victim/P.w.8, the latter suffered pain and screamed "*mummy mummy*" and, for that reason it is quite probable that the accused withdrew from further attempt at penetration. As far as the non-rupture of hymen is concerned, the Apex Court in the case of ***Madan Gopal Kakkad v. Naval Dubey, (1992) 3 SCC 204)***, has held that even slightest penetration of penis into vagina without rupturing the hymen, would constitute rape. Again, in the case of ***Ranjit Hazarika v. State of Assam (1998) 8 SCC 635,*** the Apex Court has held that non-rupture of hymen or absence of injury on victim's private parts does not belie the testimony of the prosecutrix. In the case of ***State of Tamil Nadu v. Ravi @ Nehru*** (supra), the Apex Court referred to Modi's Medical Jurisprudence and Toxicology, Parikh's Textbook of Medical Jurisprudence and Toxicology as well as Encyclopedia of Crime and Justice and observed as follows:-

"14. We may also notice the opinion expressed by Modi in Medical Jurisprudence and Toxicology (Twenty First Edition) at page 369 which reads thus:

> "Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. Rape, is crime and not a medical condition. Rape is a legal term and not a diagnosis to be

> made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one."

15. In Parikh's Textbook of Medical Jurisprudence and Toxicology, the following passage is found:

> "Sexual intercourse: In law, this term is held to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains."

16. In Encyclopedia of Crime and Justice (Vol.4) at page 1356, it is stated:

> "..... even slight penetration is sufficient and emission is

unnecessary."

Considering the injuries described by Dr. Rodrigues/P.w.10, it is very clear that there was sufficient penetration so as to complete the offence of rape. Learned Public Prosecutor has placed reliance on the case of ***Ishwar v State of Maharashtra (2005 ALL MR (Cri) 720),*** wherein it was held by this Court that in case where there was no evidence to show that the accused had discharged semen in her vagina when the accused had sexual intercourse with her and in the absence of semen and blood in the vaginal swabs or on the clothes of the accused and the prosecutrix, it could not be concluded that no rape was committed on her. The Apex Court in the case of ***Prithi Chand v. State of Himachal Pradesh (1989 S.C. 702)*** observed that mere absence of spermatozoa cannot cast a doubt on the correctness of the prosecution case and, therefore, in the absence of semen being found either on the clothes of the accused or the victim, the entire case of the prosecution which is otherwise well corroborated at every stage, cannot be thrown overboard. It may be observed that rape is all about penetration i.e. penile-vaginal penetration and certainly not about ejaculation or emission of semen as the very explanation to Section 375 I.P.C. shows. The evidence of the victim/P.w.8 has been sufficiently corroborated by Dr.

Rodrigues/P.w.10, which shows that there was sufficient penetration short of rupture of hymen which was sufficient to constitute the offence of rape. In the light of the aforesaid evidence, the learned trial Court was wrong to come to the conclusion that there was no penetration in the case at hand.

11. That should take us to the evidence of Pushpa/P.w.1, Satyam/P.w.2 and Manda/P.w.4. Pushpa/P.w.1 stated that as she was preparing Satwa/sweet dish for evening tea at about 5.00 p.m., on 14.10.2003, after serving tea to her children at 3.45 p.m. when she heard the sound of the victim/P.w.8 and she went there and saw the door closed whereupon she knocked at the door. She also stated that her younger daughter was crying inside the room and after about five minutes, the accused opened the door and the victim/P.w.8 came running towards her and when she asked the accused as to what he was doing inside, the accused kept quiet and when she asked her daughter as to what the accused had done to her, her daughter had narrated to her as to what the accused had done and further narrated that she was called inside the room and thereafter closed the room and switched off the light and forced her to lie down on the mat and thereafter asked her to remove her knicker and the accused had thereafter removed his pant and inserted his private part into

the private part of the victim/P.w.8 and had further disclosed that she should not disclose the fact to her mother and the accused threatened that she would be killed. In cross examination, she had stated that her children left the house after having tea at about 4.00 p.m. She confirmed that she had heard the sound at about 5.00 p.m. when she was preparing the said sweet dish/Satwa. In further cross examination, Pushpa/P.w.1 had stated that not knowing what to do and having seen the condition of her daughter, she had given her a bath and thereafter they had gone to the Police Station at about 8.30 p.m. She also stated that she had removed the clothes of the victim and kept aside before giving her bath. She had categorically denied the suggestions put to her that she had demanded the money from the accused or, for that matter, had an extra marital relation with the accused. It has been submitted on behalf of the accused that the timings given by Pushpa/P.w.1, differ. That is also the conclusion arrived at by the learned trial Court. However, in my opinion, there is no inconsistency in the timing giving by her at all. Whether in the complaint given by her to the police or in the version before the Court, Pushpa/P.w.1 had consistently maintained that the incident had taken place at about 5.00 p.m. on 14.10.2003 and that had taken place at a time when she was preparing sweet dish/Satwa for her children, after her children were served with tea at 03.45 p.m. It is

further submitted by the learned Counsel for the accused that if the condition of the victim, as described by her husband Satyam/P.w.2, namely that the victim was sweating and lying on the bed, Pushpa/P.w.1 would not have been gone in search of the accused as stated by him. There is nothing improbable in Pushpa/P.w.1 going in search of the accused after she had brought the victim/P.w.8 from the room and after she had called her sister and other family members. There is nothing in the evidence of Pushpa/P.w.1, which makes her version inherently improbable and in fact the version given by her is convincing and there is no reason why the same ought not to have been accepted as it came from none other than the mother of the victim herself. Pushpa/P.w.1, as a mother, would not ordinarily subscribe to a false story of rape on her daughter thereby inviting ignominy. Satyam/P.w.2, stated that he returned from Tisk, Usgao, at about 05.05 p.m. and when he returned, he saw his daughter was sweating, totally down exhausted and lying on the bed and his wife was not at home and she returned after about ten minutes. He stated that his wife told him that the accused had raped his daughter and that she had gone to see the accused and he told her that he would go to the police and lodge a complaint but his wife told him not to lodge the complaint without informing his aunt/P.w.4. No doubt, Satyam/P.w.2 stated in his cross

examination, that after he was informed by his wife about the rape, he had examined his daughter and her knicker was wet and some substance like mucus was on the inner side of said knicker. Admittedly, as stated by Pushpa/P.w.1, the victim/P.w.8 was given a bath and it is quite probable that the victim's knicker was wet and since Satyam/P.w.2 was informed that his daughter was raped, he jumped to an immediate conclusion that the said wetness was due to mucus like substance. At the most, it could be said that the said statement of Satyam/P.w.2 is out of his imagination by way of exaggeration but, on that count alone, the evidence of Satyam/P.w.2 could not have been rejected. Although Satyam/P.w.2 stated that he had handed over the clothes of the victim at the Police Station on 14.10.2003 at about 9.30 p.m., the fact remains that the said clothes were handed over by the mother on 15.10.2003 at about 15.00 hours when panchanama, exhibit 29, was done and in support whereof, Tarun Kumar/P.w.5 was examined. Only because of the said incorrect statement as regards the timing of handing over the clothes of the victim, the evidence of Satyam/P.w.2 cannot be discarded. Manda/P.w.4, is the aunt of Pushpa/P.w.1 and is the owner of the room which was let out to the accused along with other boys. She stated that she returned at about 6.30 p.m. on 14.10.2003 from Satteri Bazaar, where she had gone to sell vegetables and when she returned, she

found that Pushpa/P.w.1, her sister Kanchan and the victim were in the house. According to her, the victim was playing in the courtyard with her sister and brother and at that time, Pushpa/P.w.1 told her about the incident namely that the accused had pulled her daughter inside the room and had raped her. She also stated that she had called the victim inside the house and she could make out that she was given a bath and, thereafter, she had removed the underwear of the victim and had examined her private part and had not noticed anything abnormal. She had also stated that Sandesh, her son, told her that there was some commotion but he did not know what had happened and he also did not tell her the time of the said commotion and that he had told her that at the time of commotion, he was at the rear side and in the front side, there was no one. In cross examination, Manda/P.w.4 stated that the underwear of the victim/P.w.8, might have been wet due to water. She admitted that she had not inserted her finger inside the private part of the victim. The learned trial Court has observed that according to Pushpa/P.w.1, Sandesh was along with her at the time when Pushpa/P.w.1 went to the room of the accused and the victim/P.w.8 narrated the incident to her and if Sandesh was present at the time the victim/P.w.8 narrated the incident to her mother, he would not have told Manda/P.w.4 that he did not know what had happened. As per

the trial Court, the evidence of Manda/P.w.4 that Sandesh did not know what had happened and that when the commotion took place, Sandesh was at the rear side and when he came in front, there was no one, belies the case of the prosecution. Admittedly, Sandesh was not examined by the prosecution and his evidence could have only duplicated the version of Pushpa/P.w.1. Certainly he was not an independent witness as he was the son of Manda/P.w.4 and, therefore, a cousin of the victim/P.w.8. It is quite probable that Sandesh, being a young boy of 17 years of age, was not willing to narrate to his mother, what the victim/P.w.8 had narrated to her mother Pushpa/P.w.1 in his presence and only because Manda/P.w.4 had stated that Sandesh had told her that there was some commotion but he did not know what had happened, was not sufficient to otherwise discard the evidence of P.w.4/Manda, whose evidence was otherwise sufficiently corroborated by Pushpa/P.w.1 and Satyam/P.w.2. The evidence of Manda/P.w.4 lends sufficient corroboration to the evidence of the mother and father of the victim namely Pushpa/P.w.1 and Satyam/P.w.2. The learned trial Court committed a serious error by observing that the prosecution had not brought from the mouth of the prosecutrix that there was penetration in the vagina. Considering the tender age of the victim and the rural background, it could not have been expected that the victim

would have normally deposed to say that there was penetration. Whether there was penetration, could have been proved by medical evidence and that has been sufficiently proved by the evidence of Dr. Rodrigues/P.w.10. Likewise, the conclusion that Satyam/P.w.2 and Manda/P.w.4 had interfered with the genital of the victim before she was examined by Dr. Rodrigues/P.w.10, is without any basis. It was not the case of the defence that either the mother or the father or the aunt of the victim had even inserted their fingers into the private part of the victim. The examination of Sandesh would have only duplicated the evidence of Pushpa/P.w.1. He was neither independent nor material and could have only corroborated the evidence of Pushpa/P.w.1. There was nothing in the evidence of the prosecution to raise a doubt that the story of the prosecution could be false. In fact, the version of the victim/P.w.8 was sufficiently corroborated by the medical evidence of Dr. Rodrigues/P.w.10 and not only that there was evidence of victim's mother/P.w.1, the father/P.w.2 as well as the aunt/P.w.4, who all had no particular reason to falsely implicate the accused. As already noted, the absence of semen does not weaken the case of the prosecution but it has certainly falsified the defence of the accused taken in cross examination. If at all any adverse inference was to be drawn, it could not have been drawn due to non-examination of Sandesh, the son

of Manda/P.w.4, but ought to be drawn from the non-examination of the brother of the accused in support of the plea put forward by him as regards the demand of money made by Pushpa/P.w.1 upon him and his brother. The accused took a very bold plea in cross examination but abandoned it in his own statement under Section 313. The plea of the accused appears to be highly improbable. If accused was a source of giving money to Pushpa/P.w.1, the latter would not stop it by filing a false complaint. The evidence of the victim/P.w.8, which has been sufficiently corroborated by the medical evidence of Dr. Rodrigues/P.w.10 as well as the evidence of the mother, father and the aunt. The case of the prosecution was consistent, convincing and plausible as proved by evidence of the aforesaid witnesses and therefore was proved beyond reasonable doubt against the accused. The evidence produced was more than sufficient to conclude that the accused had committed sexual assault amounting to rape upon the victim/P.w.8. The prosecution had produced not only evidence which lent assurance to the version of the victim/P.w.8 but evidence which provided sufficient corroboration. In my view, the learned trial Court was not at all justified in giving benefit of doubt to the accused. The evidence on record discussed hereinabove, was more than sufficient to convict the accused both under Section 342 and 376 I.P.C.

12. As a result, the appeal deserves to succeed and the impugned Order is hereby set aside. Consequently, the accused is hereby convicted under Sections 342 and 376 I.P.C.

13. The name of the victim is not mentioned in view of the Judgment of the Supreme Court reported in 2006 AIR SCW 2814.

N. A. BRITTO, J.

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DATE: 23rd August, 2006.

JUDGMENT CONTINUED

14. The accused is heard on the point of sentence.

15. Shri Joshi, the learned Counsel on behalf of the accused has filed an application giving the antecedents of the accused and has submitted that the accused be dealt with under Section 4 of the Probation of Offenders Act, 1958. When it is brought to the notice of the learned Advocate that Section 376(2)(f) provides for minimum sentence of rigorous imprisonment for a term which shall not be less than ten years, Shri Joshi fairly concedes that he has not come across any provision of law that the provisions of Section 4 of the said Act would be applicable in cases where the legislature has deemed fit to provide for minimum punishment which could be reduced only in case of adequate and special reasons. The next submission of Shri Joshi is that the minimum possible sentence be imposed upon the accused in the light of what has been stated by the accused in his said application. Shri Joshi has placed reliance on several decisions of the Apex Court in order to show that even in cases where minimum sentence of

ten years has been provided for, seven years could also be given.

On the other hand, learned Public Prosecutor, has again referred to the case of ***Santan Fernandes V. State*** (supra) and has submitted that the fact situation in that case were similar to the case at hand, in that, in that case also, the accused was 24 years of age, had no criminal background and came from ordinary background and was also the only earning member of the family and, in that situation, this Court proceeded to enhance the sentence from seven years to ten years. Learned Public Prosecutor submits that no case is made out by the accused for imposition of any sentence than the minimum prescribed for, in terms of Section 376(2)(f) of I.P.C.

16. The accused was 21 years of age at the time of commission of offence, the accused having been born on 04.09.1982. The accused has three elder brothers and one elder sister, as stated in Para 5 of the application. The accused has stated that he lost his father in the year 1993 when he was studying in Std. Vth and all his brothers and sister are unmarried. According to the accused, all the members of his family work as agricultural labourers and also have an auto rickshaw. The accused has

stated that the income of the family is meagre and they live hand to mouth existence. The accused has stated that he lost his job with M/s. Nestle (India) Ltd., when he was under detention in connection with the trial of this case and that at present, he is working as Lab Assistant with M/s. Ratiopharma (India) Pvt. Ltd., at Verna Industrial Estate, at a probationary salary of Rs.2,500/- and he is only regular earning member of the family. The accused has stated that he has no vices and that he has passed XII Std in Vocational stream and, on account of his employment, has acquired lot of technical expertise in different fields. The accused has stated that he has no criminal background in as much as he is not involved in the commission of any other offence and that he undertakes to subject himself to any Order that may be passed by this Court. He has also stated that their family is preparing for the marriage of their only sister and in case he is imprisoned, he will lose his present employment.

17. In the case of State of ***Rajasthan v. Om Prakash (2002 Cri.L.J. 2961)***, the victim was eight years old and the trial Court had imposed the sentence upon the accused of seven years and by the time the case reached the Apex Court, it was found that the incident had taken place 13 years back by which the accused had reached the age of 31 years. The

Apex Court observed that the accused having played with the life of a child, the accused did not deserve any leniency or sympathy on the ground that the accused had by then matured and directed that the accused should undergo the remaining part of the sentence. In the case of ***State of Chhattisgarh v. Derha (2004 Cri. L.J. 2109)***, the case was under Section 8 (2)(f) and the Apex Court found that the accused was hardly 18 years of age at the time of commission of the offence and had served six and half years of imprisonment and since then the accused had married and had a family and considering the aforesaid facts, the Apex Court thought that a sentence of seven years R.I. would be appropriate in the facts and circumstances of the case. In the case of ***State of Madhya Pradesh v. Munna Choubey & anr. (AIR 2005 S.C.C. 682)***, the accused were sentenced under Sections 450, 376(1)/109(1) of I.P.C., to undergo rigorous imprisonment for a period of seven years and a fine of Rs.2,000/-. The sentence was reduced by the High Court and the Apex Court stated that a sentence less than the prescribed minimum can be imposed only by reasoned order and the reasons should be adequate and special and not fanciful and proceeded to uphold the sentence as awarded by the trial Court.

18. The victim/P.w.8 in this case was five years, one month and three days old while the accused was 21 years of age at the time of commission of the offence. The punishment provided in terms of Section 376(2)(f) is rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine. The said imprisonment could be reduced for adequate and special reasons to be mentioned in the Judgment, for a term less than ten years, in terms of the proviso under sub-section (2) of Section 376 I.P.C. The Apex Court in the case of ***State of Madhya Pradesh v. Munna Choubey & anr.*** (supra), has stated that imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

19. The injuries as described by Dr. Rodrigues/P.w.10 upon the victim/P.w.8, must have certainly healed but nevertheless the scars left by the said injuries, which are physical, emotional as well as psychological may never heal and she may have to live with them in her entire life. Of late, crimes such as these upon children are on the rise. In the case of ***State of Madhya Pradesh v. Munna Choubey & anr*** (supra), the Court found that merely because the accused belonged to a rural area could be for no specific reason to reduce the sentence. In the case of ***State of M.P. v. Balu ((2005) 1 S.C.C. 108),*** the Court found that the age of 17, illiteracy and the fact that the accused came from a rural area, were not adequate or special reasons. Again in the case of ***State of Madhya Pradesh v. Santosh Kumar (2006 AIR SCW 3608)***, the Supreme Court observed that in order to exercise the discretion of reducing the sentence, the statutory requirement is that the Court has to record adequate and special reasons and not fanciful reasons which would permit the Court to impose a sentence less than the minimum prescribed. The Court emphasised the fact that any reason had to be not only adequate but also special, though what is adequate and special would depend upon several factors and no straitjacket formula can be indicated and what is applicable to the trial

Courts is applicable to the High Court as well. The Apex Court then proceeded to observe that the young age of the accused and the fact that he belonged to Scheduled Tribe, could by no stretch of imagination be considered either adequate or special for reducing the sentence since Section 376 (2) provided for a more stringent punishment when the victim is under 12 years of age.

20. In my view, what has been stated on behalf of the accused in his said application and which has been reproduced herein above, could by no stretch of imagination be termed as adequate or special reasons to impose a sentence than the minimum prescribed under Section 376(2)(f) I.P.C. Deterrence remains as one of the objects behind the imposition of punishment. Considering the facts of the case, including what has been stated on behalf of the accused, in my view, this is not a fit case to impose sentence than the minimum prescribed by Section 376(2)(f) of I.P.C. The accused, therefore, is hereby sentenced under Section 342 I.P.C. to undergo rigorous imprisonment of one month and to pay a fine of Rs.1,000/- , in default, to undergo S.I. of fifteen days. The accused is also sentenced under Section 376 I.P.C., to undergo ten years RI and to pay a fine of Rs.10,000/-, in default, to undergo six months S.I. The sentences imposed herein shall

run concurrently. In case the fine is paid, the entire amount shall be paid to Pushpa/P.w.1 to be used for the benefit of the victim/P.w.8. The accused to surrender before the trial Court to undergo the sentence upon the expiry of three weeks from today.

N. A. BRITTO, J.

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